No. 928

IN THE

Supreme Court of the United States

HESTER HINES, ADMINISTRATIX
of the Estate of
IVAN PEARL HINES, Deceased, ...Appellant,

V.

LOUISVILLE & NASHVILLE RAILROAD
COMPANY, ... Appellee,

and

SINDIE BALTIMORE, ADMINISTRATRIX
of the Estate of
PAUL RAY PRITCHARD, Deceased, ...Appellant,

V.

LOUISVILLE & NASHVILLE RAILROAD
COMPANY, ... Appellee.

PETITION FOR A WRIT OF CERTIORARI
and
BRIEF OF COUNSEL FOR APPELLANT

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your appellants, Hester Hines, Administratrix of the Estate of Ivan Pearl Hines, and Sindie Baltimore, Administratrix of the Estate of Paul Ray Pritchard, respectfully represent unto your honors that they are aggrieved by a final order and judgment entered in the United

States Circuit Court of Appeals for the Fourth Circuit at Richmond, Virginia, on November 13, 1944. Appellants show that by agreement of all parties their cases were consolidated and heard together. They, therefore, file this, their petition, and pray that this Court may issue a writ of certiorari to the said Circuit Court of Appeals to bring before this court the record and proceedings before the said Circuit Court of Appeals, and that, after a review thereof, the judgment and order of the said Circuit Court of Appeals be reversed and this cause be remanded to the United States District Court for the Western District of Virginia at Big Stone Gap, Virginia, for a new trial.

FACTS OF THE CASE

Appellant's decedents were two boys, each sixteen years of age, residents of Pennington Gap, Lee County, Virginia. On the night of July 13, 1943, these two boys left their home soon after dark for the purpose of going to a pond near Dryden, Virginia, to hunt frogs. They left the home of the Hines boy between 8:00 and 8:30 p.m. (22). It was approximately five miles from their home to the pond (22). The Hines boy had been to this same pond on several other occasions (21). The boys were of average size and strength for their ages, and Pritchard was in the eighth grade (18), and Hines was in the seventh grade (23). They were equipped with one gig and two carbide lamps (21). Nothing was seen or heard of the boys from the time they left home until around midnight when one Udell Lawson stopped by to take a swim and wash up some on his way home. He saw these two boys there frog hunting (26 and 27). The boys had told their parents that they intended to spend the night and would be back home about five o'clock in the morning (22).

The bodies of the two boys were found on the track of the defendant company at a grade crossing where the main highway crossed the tracks. This crossing was

located about one mile west of the Dryden Depot, and in the direction of Pennington Gap, where the boys lived. The bodies were discovered by some men going to work early in the morning, who reported the accident to the nearest house (64). On that night Bill Walker and Benny Hall, engineer and fireman for the defendant, had taken engine No. 1345 from Pennington Gap to Norton and return (92). They were called to report for duty at 9:30 that night (95). They left Pennington Gap with the train sometime between 9:30 and 11:00 p.m. and returned to Pennington the next morning at an hour not specified in the record. The evidence does show, however, that this same engine was taken out by another crew at 7:30 a.m. (92) and returned to Pennington Gap at 3:00 p.m. that day. When the engine watchman reported for work at 3:00 p.m. that day he found a message directing him to search this particular engine (92). He made that search and found pieces of flesh that appeared to be brains, one with dark hair attached and the other with light hair (93). One of the boys was a brunette and the other was a blond. These particles of hair were on opposite sides of the engine and were lodged upon the brake rigging, about the middle of the engine (93 and 94). On this night when engineman Hall was called to take out this engine on its run to Norton and return, he was drunk when he reported for duty (104).

On this particular morning one Eloise Reasor had a sick child, and she and her husband were up with the child between three and four o'clock (30). Their home is about twenty-five yards from the railroad, and is located between the Dryden depot and the railroad crossing, at which this accident occurred (29). While they were up with their sick child they heard a train pass going toward Pennington. Around five o'clock or a little after five, they heard another train go toward Pennington (30). While this witness did not pay any particular attention to the train, she did not have any recollection of hearing the first train that went down toward

Pennington that morning blow for the highway crossing. Her husband testified to the same effect (36). This witness had picked these same boys up in his automobile early in the morning as he was going to work in the mine some two weeks before this event. He came back around by the scene of the accident on the morning that it occurred, having made a circle from Dryden to Woodway, to Pennington, and thence back over the main highway toward Dryden. He arrived at the scene between 5:30 and 6:00 p.m. (37), and identified the boys, as none of those present knew them. There is some confusion in the records with reference to the time, but this occurs due to the fact that the Western end of Wise County and the Eastern end of Lee County are near the border between the Eastern Standard Time Zone and the Central Standard Time Zone and some people use one time, while others use another.

On this particular morning one W. M. Trent was at the home of Robert Taylor. This home was located between the highway and the railroad, and was four hundred and eighty-seven steps from the grade crossing (48). This was a man of advanced years, and who was forced to get up a good deal during the night as he had kidney trouble. On this particular morning he had gone out of the house. The hour is not definitely fixed, but he testified that it was beginning to break daylight (68). He returned to his bed and was lying there waiting for time to get up when he heard a train blow for the Dryden station, east of his home (49). He listened to this train come on down and pass behind his home, and go on down to the grade crossing. He kept listening to see if the train was going to blow for the crossing and testified that, "If it blowed, I never heard it, and I never heard the whistle blow any more on that train after it left up there about Dryden" (49). Neither did he hear any bell ringing on that train (50). This train passed immediately behind the house in which he was living, and the whistle board for this crossing was located only a short

distance toward the crossing from the house.

Later that morning Mr. Trent got up and put on his clothes. He went out on the front porch of Taylor's house and was sitting there tying his shoes when some coal miners came by in an automobile, and informed him that two bodies were on the crossing. Immediately after that Trent, Taylor, and Taylor's family went to the crossing, and there they discovered the bodies of these two boys. Both bodies were lying between the rails. They were about twenty feet apart and from twenty-five to fifty feet west of the crossing (71). One of the carbide lamps was sitting upright on the second tie east of the guard plank, which forms the crossing proper, and the other was lying near one of the bodies. There was also a knife outside of the rail next to the highway and near the body. On the crosing proper there were some brains and hair down between the wooden board and steel rail in the slot left for the flange of the wheel to run in (73). There was also some blood on the rail and a foot and a leg was lying outside of the rail at the lower or western side of the highway. It was on the edge of the hard surface portion of the road (54).

On his way down to the scene Taylor stopped at another home where they had a phone and called the sheriff in Pennington Gap, and advised him of the accident.

The bone and flesh found between the guard plank of the crossing and that rail of the track was the farthest East that Taylor saw of any sign of the accident with the exception of the carbide lamp which was on the second tie east of the crossing proper (76).

At the point where the highway crosses the railroad, the railroad is practically straight. There is a plain view of the crossing for a distance of eight hundred seventy-five feet, along the railroad traveling from Dryden toward Pennington Gap, or in a Western Direction (43). The highway runs parallel to the railroad for about three hundred feet, before it makes a turn and goes up the bank of the railroad and across. The highway along

this point is four feet two inches lower than the railroad, and is located from thirty-two to thirty-seven feet from the railroad (44). At the time of this accident, the defendant company had permitted the embankment between the highway and the railroad to grow up with weeds which were around five feet in height (116).

Mr. Trent thought it was about forty minutes from the time the train passed going West until the men notified him of the accident (65). There were two other trains that passed that morning, one of which went West, and the other East (67). However, neither one of the other two trains passed until after the bodies of these boys had been removed from the track (64). The bodies were not picked up until about 6:00 a.m., at which time rigor mortis had not set in, as the bodies were found perfectly limber (83).

There is some evidence that there was some disturbance of the gravel on the railroad just east of the crossing. Mr. Trent testified that he saw where the gravel had apparently been disturbed there, but did not know whether it was caused by some of the people gathered to the scene or what made it. The first man on the scene, Robert Taylor, (82), testified that he looked around the eastern end of the crossing and didn't notice any sign at all, except the portions of the bodies found between the guard plank and the rail, near the eastern end of the crossing, and the lamp. J. W. Newman also testified that he saw some drops of blood just at the east end of the crossing boards, and that they extended to the second tie (111). The crossing itself was very narrow, being less than sixteen feet ((12).

(NOTE: The numbers above refer to the pages of the record of the cases as certified by the lower court.)

At the conclusion of the evidence of the plaintiffs as outlined above, defendant's counsel moved the court for a directed verdict. The District Judge sustained the motion and directed a verdict in each of the cases for the defendant. As shown by the Court's opinion and

order, this motion was sustained largely upon the apparent belief of the District Judge at that time that the plaintiffs had failed to prove what engine had killed plaintiffs' decedents or at what time the accident had occurred. The District Court did not take into consideration at all the fact that the defendant had admitted in the pleadings that its Engine No. 1345, driven by Walker and Hall as engineer and fireman, was the engine that had killed the boys, and the pleadings further did not deny that the train passed over this crossing where the boys were killed between 3:00 and 5:00 a.m. on the morning of the accident.

The Circuit Court of Appeals did not have the same difficulty in deciding what engine hit the boys, but was of the opinion that the circumstances of the happenings were so crowded in uncertainly that the matter should not be left to a jury. The opinion cites the case of Va. & S.W. Ry. Co. v. Bailey, 103 Va. 205, 49 S.E. 33 to the effect that the plaintiff must prove some negligent act and that there must be affirmative and preponderating evidence that the injury sued for would not have occurred except for the negligent breach of some duty which the defendant owed to the plaintiff.

The opinion further cites the case of Owens v. So. Ry. Co., 33 Fed. 2nd 870 (N.C.), in which the Circuit Court of Appeals for the Fourth Circuit denied liability for the death of plaintiffs' decedents when killed by a train because the evidence did not show with certainty whether decedent was killed while walking along the railroad track, or standing on the railroad platform, or otherwise, and where the only ground of evidence apparently alleged was the nonexistence of a headlight on the engine as required by the North Carolina Code. The opinion of the court then uses this language, "Giving to all the evidence, introduced on behalf of the plaintiffs, the most favorable interpretation for them, we can find nothing that proves in the least degree any negligence on the part of the defendant railroad company in the accident."

THE QUESTION INVOLVED

Should this case have been submitted to a jury for a decision or was the action of the court in directing a verdict for the defendant proper under the circumstances and facts proven in the case?

STATEMENT OF JURISDICTION

This Court has jurisdiction to review the judgment of the Circuit Court of Appeals in this case under Title 28, Section 347 U. S. C. A. (Judicial Code Section 240 amended).

REASONS RELIED UPON FOR THE ALLOWANCE OF A WRIT OF CERTIORARI

The question of how far the United States District Court may carry the idea of deciding cases without allowing the juries to pass upon same is one of vital and general interest, especially at this time. For many, many years there has existed in the judicial bodies of the United States an apparent conflict of policy and decision between juries and judges. This has been especially noticeable in railroad cases. Most every state has among its decisions cases referred to by the lawyers as the "railroad cases." These are cases in which the railroads generally had adverse verdicts from the juries and for one reason or another those verdicts were vacated and annulled by the appellate courts. Often the juries' verdicts were unfair and excessive, but, it is submitted, that just as often the decisions of the appellate courts reversing those verdicts committed just as many errors against justice in favor of the railroads. The juries were not fools, but they looked upon the judges as being dominated by the railroads and, no doubt, that fact often influenced their verdicts to be higher than they would have been if they had had confidence in the plaintiff's obtaining pure and unadulterated justice.

In most of these cases the judges were not admin-

istering justice so much as they were trying to foster a policy. That policy was that the railroads were good things and necessary for the development of the country, and that the appellate courts should stand between the railroads, then being established, and judgments for damages to individuals which might interefere with their growth and proper development. This same policy has greatly influenced a large class of litigation in appellate courts in past decades and has been the inspiration for many of the common law defenses.

It is submitted that in this year 1945 our railroads and industry generally have reached such peaks of power, finances, and so control the raw materials of the nation that there is no reason to flount justice for the further protection of industry or the promulgation of any policy.

With our multiplied governmental functions of today has come a great increase in administrative agencies. This trend to govern by men and decrees instead of by laws and precedents has had its influence upon the courts. Attention is called to the Rule 38 of the Rules of Civil Procedure of the District Courts which revokes the right of trial by jury as declared by the Seventh Amendment of the Constitution by automatically waiving trial by jury unless a demand therefore in writing is made not later than ten days after the service of the last pleadings. In other words the litigant does not get what is guaranteed to him by the Constitution, and is one of the main principles upon which our Constitution is founded, unless he gives a written demand therefore within a very limited time. The implication is plain. Those who framed that rule did not have confidence in the verdicts of their fellow-citizens, even in this enlightened age of ours. Since the adoption of the Rules of Civil Procedure for the United States District Courts, it is submitted that the judges of those courts have generally extended and widened the exercise of their authority in deciding cases without juries. The result of this trend must be decisions colored by the natural inclination of the judges, his back-

ground, his political beliefs, and, in some cases, even the state of his digestion. This is an unhealthy trend for a democracy. Wtih our present day enlightenment and industrial development it is time for the courts to drop their ideas of policy and leave that to other branches of government and content themselves with the administration of justice regardless of where the burden falls. In order that this court may define and limit the rights and powers of judges and juries over questions of fact and evidence, it is submitted that this case should be reviewed.

BRIEF OF COUNSEL FOR APPELLANTS IN SUPPORT OF THEIR PETITION FOR A WRIT OF CERTIORARI

THE ARGUMENT

ON REASON AND PRINCIPLE:

Here we have two young boys budding into manhood, returning to their home after a night spent in hunting frogs. The only evidence in the case touching on the point shows that heretofore they had made this trip and had traveled the highway. They could travel along the highway or railroad either. We believe that the reasonable inference is that on this occasion they had traveled the highway because they had been picked up by a motorist on the highway on another similar trip. Because it was easier walking, and because there was an opportunity to catch a ride on the highway, which did not exist on the railroad. The evidence does not show that there is any different by rail or by highway. Be that as it may, these two young boys were killed upon the grade crossing provided for the use of the public. The train which killed them was traveling West by the location of the bodies and the signs at the crossing.

On this night Engineer Walker and Fireman Hall had taken defendant's engine No. 1345 from Pennington Gap to Norton and return. They were called to report for

duty at 9:30 P.M. The plaintiff did not know at what hour they returned to Pennington Gap with this train, but that information is peculiarly within the knowledge of the defendant. Upon motion of counsel for the defendant, plaintiff's counsel was required to file a bill of particulars in this case (6). Defendant's counsel was not satisfied with the bill of particulars, and moved the court for more specific information, especially with reference to the train which was alleged to have killed plaintiff's decedents. This additional information was given in a supplemental bill of particulars (8), wherein it was stated that from the best information available, plaintiff's decedents were killed by Engine No. 1345, which was being operated at this time by Engineer Bill Walker and Fireman Hall, and which train was proceeding from Dryden toward Pennington Gap. The original bill of particulars had given the time of the accident as between 3:00 and 5:00 A.M. In the answer and denials filed February 7th (9), defendants state as follows, "It is admitted that if any of defendant's trains struck and killed plaintiff's decedents, it was more probably that train, traveling Westward from Dryden to Pennington." The expression, "that train" refers to engine No. 1345, as set forth in the supplemental bill of particulars.

Defendant's answer and denial (10), in paragraph (b) 1, states that defendant is without sufficient knowledge or information concerning whether it was the train being pulled by engine No. 1345, and operated by Engineer Bill Walker and Fireman Hall which struck and killed plaintiffs' decedents, but admits that if any of defendant's trains did strike and kill said decedents, it was that train designated by said plaintiff.

It is submitted that under those pleadings and under the evidence showing the death of these boys on the railroad crossing, and the particles of their flesh and hair found upon engine No. 1345, that no additional evidence is needed as to what train killed them. Yet, in spite of all this the District Judge seemed to be of the opinion

that he did not know which train had caused the death of these boys. He seems to have been confused with reference to the testimony concerning other trains that passed (129). The evidence of Mr. Trent was perfectly plain that only this one train passed, which train did not give the statutory signals for a crossing, because he listened particularly and wondered why it did not blow for the crossing, as the trains usually did, there near his house. The other trains that passed and which were testified about and confused the District Court, did not pass until after the boys' bodies had been picked up and removed from the track. There is no conflict in the evidence on this point.

While the matter of the train involved and the time of the accident apparently bothered the District Judge more than any one incident, the Justices of the Circuit Court of Appeals did not have that difficulty under the record in this case. That court seems to have arrived at its decision upon the ground that no negligence had been shown. Attention will hereinafter be called to the statutes of Virginia with reference to the signals required to be given by trains as they approach grade crossings. It will be particularly noted that if these signals are not given contributory negligence of any person injured at the crossing does not bar a recovery, but merely goes in mitigation of the damages. The record in this case clearly shows that the operators of engine 1345 failed to give the statutory signals as it approached this highway crossing on the morning that these boys were killed. This was not shown by negative evidence but by the testimony of a man who had just been up from his bed and had lain down again waiting until time to arise and who listened to this train pass and particularly wondered why it did not blow the whistle and ring the bell as was customary in approaching the crossing. That is negligence under the Virginia Statute and contributory negligence of the deceased would not bar recovery, even if it could be said that they were guilty of such.

THE ARGUMENT CONTINUED

ON AUTHORITY:

We consider it elementary that upon a motion for a directed verdict the evidence must be considered most favorably to the opponent of the motion, Livingstone v. Atlantic Coast Line Railroad Company, 28 F. 2d 563.

The law with reference to directed verdicts is also well settled both in Federal and State Courts, and is that in cases where the evidence is undisputed and of such conclusive character that only inferences in favor of one party can be draws therefrom, the court may and should direct a verdict for that party. See Small Co. v. Lamborn & Co., 267 U. S. 248, 254, 45 S. Ct. 300, 303, 69 L. Ed. 597. Chicago M. & St. P. Ry. v. Coogan, 271 U. S. 472, 478, 46 S. Ct. 564, 70 L. Ed. 1041.

While the "Sintilla Doctrine" has largely been abandoned, the fact that the evidence in a case does preponderate strongly and favorably on one side will not justify its being taken from the jury. As stated in the case of Bell v. Brown, U. S. App. D. C., 128 F. 2d 317:

> "The evidence in this case as we read the record, preponderates strongly against the appellant. Nevertheless, we are satisfied that there was enough to require that the case go to the jury; under the well established rule that if there is evidence upon which, when construed most favorably to the person upon whom the onus of proof is imposed, resonable and fair-minded men, properly instructed as to the law, could find a verdict in his favor, then the question is not one of law, but of fact to be settled by the jury."

In the old case (decided 1893) of Richmond & Danville R. R. Co. v. Powers, 149 U. S. 43, 13 S. Ct. 748, 37 L. Ed. 642, a man was killed when leaving the station of the defendant company and starting to walk toward an eating house. On the way it was necessary for him to cross a track. As he started to cross that track he

stepped in front of a moving train, which caused his death. The Lower Court directed a verdict for the defendent company, and in reversing that action the Supreme Court stated:

> "The rule is well settled that, even where the facts are undisputed, if reasonable men may draw different conclusions from them, the case should be left to the jury."

The United States Circuit Court of Appeals for the Fourth Circuit in the case of Holmes v. Holland Furnace Co. (CCA N. C.) 103 F. 2d 563, followed the above. That was an action for damages instituted by Holmes against the company for alleged negligence in installing a furnace and in which the defendant filed a counter claim for the balance alleged to be due on the furnace. At the end of all the testimony the District Court dismissed the plaintiff's claim and entered judgment on the counter claim. The case was appealed on the sole question of whether the Trial Court was justified in taking the case from the jury. In deciding that the Trial Court had erred in so acting the opinion states:

> "It is not necessary to cite authority to the effect that when one party moves for a judgment or nonsuit or for dismissal, the evidence must be considered in its aspect most favorable to the opposite party; that the weight of testimony is always for the jury to determine; and courts will take fact questions from the jury only where the necessity for such action is clear and imperative. On the other hand it is equally well settled that where the evidence is so clear and conclusive that reasonable men could draw but one inference therefrom, it is the duty of the trial judge to take the case away from the jury, Gunning v. Cooley, 281 U. S. 90, 50 S. Ct. 231, 74 L. Ed. 720; Lumbra v. U. S., 290 U. S. 551, 54 S. Ct. 272, 78 L. Ed. 492. Cer-

tain-Feed Products Corp. v. Wallinger, 4th Cir., 89 F. 2d 427. Or, putting it conversely, if upon the evidence, reasonable men might differ, the case is for the jury, not the court."

In the case at bar, counsel for the defendant in their motion for a directed verdict take the position that perhaps the decedents were not on the crossing. They seem to think that if this were true that then this was not a crossing accident. This argument was based upon the testimony that one of the carbide lamps was on the second tie east of the crossing. The lamps were both exhibited to the jury. One of them had a large reflector attached to it, which had apparently come from a headlight of an automobile. This lamp, with the large reflector was carried some forty feet west of the crossing and left between the rails and did not receive any noticeable dents or scars. If that could happen would there be anything unusual to say that the other lamp bounced in the opposite direction from that in which the train was traveling, and was left some twenty-four inches away from the end of the boards which formed the crossing. We submit that certainly fair-minded men might differ from the inference to be drawn from this fact. We do not admit that even if these boys were two feet away from the guard board, put between the rails to form a crossing for vehicles, that then it would not be a crossing accident The evidence showed that the crossing prepared by this defendant was narrow and if the decedents, as pedestrians, were walking along on the edge of the highway, they would miss the crossing as prepared by the defendant company, and would cross the track at the end of same. Plaintiffs are not to blame for those circumstances. The defendant chose the length of the boards that they would put in to form the crossing.

Defendant's counsel also based that part of its motion on the fact that some drops of blood were found just east of the crossing. On this point the evidence was that a

portion from the head of one of these boys was between the rail and the crossing board near the east end of the crossing. Would there be anything unreasonable to say that the blood from that mangled body had splattered a few feet so as to show just east of the crossing? We submit that if there is no controversy about that point that the absence of controversy must be based on the fact that all inferences to be drawn from such testimony would be in favor of the plaintiff, that the accident did occur on the crossing.

In 20 American Jurisprudence, page 217 is found this statement:

> "One of the strongest disputable presumptions known to the law is the presumption 'that a person is innocent of crime.' This presumption applies not only in criminal cases, but also in civil cases where the commission of a crime comes collaterally in question. In civil actions or proceedings the law presumes that men do not commit criminal offenses until the contrary is shown."

Again in American Jurisprudence, page 221, is this:

> "Closely allied to the presumption of innocence is the presumption that the law has been observed. The law presumes, in the absence of proof to the contrary, that everyone obeys the law and discharges the duties imposed by law upon him, especially when a violation constitutes a criminal offense."

In our jurisprudence presumptions are an important part of evidence. It is clearly shown then that the presumption here is that the deceased were not trespassers, but that they were walking upon the highway where they had a lawful right to be and were using the crossing of this railroad as they had a lawful right to do. This presumption is part of the evidence in this case and when the Lower Court overruled that presumption it certainly

gave great weight to the testimony with regard to one of the carbide lamps being located on the second tie East of the sixteen-foot guard plank placed on the railroad by the company to form the crossing. It is submitted that to obtain such a result from such an incident makes the court guilty of speculation and an accusation that the Lower Court has ignored the evidence in the case. It is plainly shown that all signs of the injuries to these boys were upon the crossing itself and West of the crossing as their bodies were carried in the direction the train was traveling.

In the case of McVey v. C. & O., 46 W. Va. 111, 32 S. E. 1012 it was held that because no proof was offered to show that the decedent, in going on the track of the railroad company stopped and looked for an approaching train, does not raise the presumption that he did not stop and look, unless the evidence shows that he must have seen the approaching train if he had looked. In the case at bar our position is much stronger. There is no evidence offered as to whether the boys had walked the railroad or the highway. Because of the absence of such evidence there can be no presumption that they violated the law and trespassed upon the railroad, but the presumption is that they were upon the highway where they had a right to be.

If the defendant has nothing to stand upon with reference to what train killed plaintiffs' decedents or with reference to whether this was a crossing accident or a non-crossing accident, then what is left? There can be only one other point and that is, does the evidence shown in the record in this case, when considered most favorably for the plaintiff, show negligence on the part of the defendant sufficient to support a verdict? We submit that the answer to this question must be in the affirmative.

Generally speaking, the question of whether negligence exists is a question for the jury and not for the court. As stated by the court in the case of Gunning v.

Cooley, 50 S. Ct. 231, 281 U. S. 90:

> "Where uncertainty as to existence of negligence arises from a conflict in the testimony or because, the facts being undisputed, fair minded men will honestly draw different conclusions from them, the question is not one of law but of fact to be settled by the jury."

And again in the recent case of Bailey v. Central Vt. Ry. Inc., 63 St.C. 1062, 319 U.S. 350, 87 L. Ed.:

> "The jury is the tribunal to decide issue of fact where fair minded men might reach different conclusions, as well as issues involving controverted evidence."

Here we have a case in which two young men are returning to their home very early in the morning. They are on the crossing where the main highway leading to their home crosses the track of the defendant company. In their location at that point, they were where they should be seen by the defendant's employees for a distance of at least eight hundred feet. As they approached this crossing, they were on a road which was parallel to the railroad, but some four feet two inches lower. Between them and the railroad this defendant had allowed weeds and vegetation to grow as high as a man's shoulder. Placing these weeds on top of the bank of the railroad, we find that these boys were walking just below an impediment to their vision more than eight feet tall. They were close to this and therefore, on account of the negligence of this defendant in failure to keep its right-of-way clean at the point of approaching this crossing, they would be unable to see the train approaching some distance up the track. Of course, they could see when the train had gotten even with them, because the engine would stand high enough to be seen. But the answer to that is that if they were back on the road at the time that the engine got even with them, they would never have been hit, for the engine was going much faster than they were, and would have been over the crossing before

they reached it. These two boys followed the road around and up an embankment covered with weeds only to find themselves in front of a swiftly moving train. The train had been concealed from their sight and it did not give the statutory signals by blowing the whistle and by ringing the bell. Sections 3958 and 3959 of the Code of Virginia, provide as follows:

3958. "Bell and whistle; liability for failure to use.—Every railroad company, whose line is operated by steam, shall provide each locomotive engine passing upon its road with a bell of ordinary size, and steam whistle, and such whistle shall be sharply sounded outside of incorpodated cities and towns at least twice at a distance of not less than three hundred yards nor more than six hundred yards from the place where the railroad crosses upon the same level any highway or crossing, and such bell shall be rung or whistle sounded continuously or alternately until the engine has reached such highway crossing, and shall give such signals in cities and towns as the legislative authorities thereof may require."

3959. "Effect of failure to give statutory signals.—If the employees in charge of any railroad engine or train fail to give the signals required by law approaching a grade crossing of a public highway, the fact that a traveler on such highway failed to exercise due care in approaching such crossing shall not bar recovery for an injury to or death of such traveler, nor for an injury to or the destruction of property in his charge, where such injury, death, or destruction results from a collision on such crossing between such engine or train, and such traveler or the property in his charge, respectively, but the failure of the traveler to exercise such care, may be considered in mitigation of damages."

We submit that the evidence in this case is not purely

of a negative type. Of course, the evidence of Eloise Reasor and Roy Reasor is negative, but the evidence of W. M. Trent is very close kin to direct positive testimony. He states that he listened for the train to blow the whistle for this crossing. That he did not hear it blow, and that he wondered why it did not blow the whistle for the crossing. He further states that the bell on this train was not rung. It seems clear to us that this evidence shows two distinct lines of negligence on the part of the defendant. One, in failing to keep its right-of-way clear at the point of this crossing, and thereby concealing the approach of trains from those using the highway, and the other in failing to give the statutory signals required of all railroads when they approach a grade crossing outside of an incorporated town.

As stated by the Supreme Court in the recent case of Tiller v. Atlantic Coast Line R. R. Co., 318 U. S. 54, 63 S. Ct. 444, 87 L. Ed. 610, 143 A. L. R. 967:

> "No case is to be withheld from a jury on any theory of assumption of risk and **questions of negligence should under proper charge from the court be submitted to the jury for their determination.**" (Bold face ours.)

In this case there are many points which lie peculiarly within the knowledge of the defendant. In the case of Bray v. Boston Lumber & Builders Corp., 161 Va. 686, 172 S. E. 296, the Supreme Court of Appeals of Virginia held that to strike the plaintiff's evidence and thereby direct a verdict for the defendant in a case where part of the facts were peculiarly within the knowledge of the defendant was a drastic action. The opinion of the court quoting from an opinion of Justice Epes in the case of Jones v. Hambury, 158 Va. 842, 164 S. E. 546, stated:

> "Where material facts and circumstances of a case

lie peculiarly within the knowledge of the defendant, or peculiarly within the knowledge of both the plaintiff and the defendant it is a very drastic proceeding to strike out all the plaintiff's evidence on a motion made at the conclusion of the plaintiff's evidence in chief, before the defendant has testified. A motion to strike out made under such circumstances should not be sustained unless it is very plain that the court would be compelled to set aside a verdict for the plaintiff upon a consideration of the evidence strictly as upon a demurrer to the evidence, and in the light of the fact that the defendant has seen fit not to testify and subject himself to cross examination. Where a motion to strike out is made after all the evidence for both parties has been introduced or upon a motion to set aside a verdict, a somewhat more liberal rule is sometimes applied for the consideration of the evidence in passing upon the motion; but in cases such as this (where the motion to strike out is made at the conclusion of the plaintiff's evidence in chief), the court will rigidly apply the rule applicable to the consideration of evidence upon demurrer to the evidence.

SUMMARY

Wherefore, your petitioners, therefore, pray that a writ of certiorari be granted to bring before this court the record and proceedings before the Circuit Court of Appeals, and that, after an inspection thereof the judgment of the Circuit Court of Appeals and the District Court be reversed and this cause remanded to the District Court for a new trial before a jury. In the event the writ is granted petitioners ask that this brief be treated as their opening brief upon the hearing of the case on its merits, for which petitioners intend it. Petitioners have filed with the Clerk of this court a certified copy of the entire record in this case and eleven copies

of the printed appendix record upon which the case was heard in the United States Circuit Court of Appeals, including the proceedings in that court.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1944.

No. 928.

HESTER HINES, Administratrix of the Estate of Ivan Pearl Hines, Deceased, Et Al., - Petitioners,

versus

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, - - - - - - - Respondent.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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IN THE

Supreme Court of the United States

October Term 1944.

No. 928.

HESTER HINES, ADMINISTRATRIX OF THE ESTATE OF IVAN PEARL HINES, DECEASED, ET AL., - - - - - - - - - *Petitioners,*

v.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, - - - - - - - - *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

OPINION BELOW.

The opinion of the District Court for the Western District of Virginia at Big Stone Gap will be found at pp. 1-5 of the Transcript of Record filed in this Court by petitioners on February 8, 1945, and the opinion of the United States Circuit Court of Appeals for the Fourth Circuit will be found at pp. 55-60 of said Transcript.

QUESTION PRESENTED.

Should this Court grant a writ of certiorari to review the decisions of the District Court and the Circuit Court of Appeals where there is no question of public importance or of general or federal law involved but where the decisions are rested upon the law of Virginia, where the injuries complained of occurred, and where there is no claim that said decisions are in conflict with the decisions of the highest court of Virginia, and where both courts have found that the evidence was not sufficient to justify a recovery under the law of Virginia?

STATEMENT.

All references to the Record ("R.") in this statement are to the printed Transcript of Record filed with the Clerk of this Court by petitioners on February 8, 1945.

The evidence introduced in the District Court shows that the two boys (decedents) left the home of the Hines boy at Pennington Gap between 8:00 and 8:30 P. M., July 13, 1943, to hunt frogs in a pond near Dryden; that around midnight two boys, not identified, were seen at a pond near Dryden and were making inquiry in respect to other ponds in the community; and that about daylight the next morning the mangled body of the Pritchard boy was found about 50 feet west of a grade crossing, and the mangled body of the Hines boy about 75 feet west of this grade crossing

(R. 50). This grade crossing is located about three-quarters of a mile from the pond near Dryden, and about 4 miles from Pennington Gap, where decedents lived. There is no evidence which shows the time the decedents left the pond or what they were doing at the time they were fatally injured. Assuming that the two boys who were seen at the pond about midnight were the decedents, this is the last time they were seen alive. No one testified to having seen the boys at the time they were fatally injured. Neither is there any testimony to show what they were doing at that time or their position upon the railroad track. There were signs along the railroad track which started about the second (cross) tie east of the crossing, and which extended westward "like something had been swept down over the crossing" (R. 50). Another witness said it "looked like there had been a little scuffle of some kind in the gravel" (R. 15). Blood spots, a carbide light and a stick, something like a walking cane, were found about two (cross) ties east of the crossing (R. 15, 18, 51, 52). Scraps of "something" were found in a (rail) joint "right east of the crossing, right close to the crossing" (R. 53). This evidence refutes the statement in petitioner's brief (p. 10) that the decedents were upon the crossing when struck by the train.

An examination of respondent's engine No. 1345 at 3:00 P. M., some 10 hours after decedents' mangled bodies were found, revealed hair and scraps of brains on the second brake rigging, about the middle of the engine (R. 42). That engine had been operated from Pennington Gap to Norton and return the night of

the fatal injury (R. 42), but the evidence does not show what time it passed the point where decedents' bodies were found, on either movement. The testimony of Louise Reasor (R. 32) and of her husband, Roy Reasor (R. 39, 40) show clearly that three trains passed this point between 3:00 A. M. and 5:00 A. M., two moving westward and one eastward. Roy Reasor left his home "right around five o'clock" and stopped at the point where the bodies were found between 5:30 A. M. and 6:00 A. M. (R. 37).

Wm. Trent, who was staying in the home of Robert Taylor, located some three-quarters of a mile from the crossing in question, heard only one train pass the crossing after he awoke. That train was going westward and he did not hear it signal for the crossing (R. 9). Trent at first said this train passed "something like four o'clock" (R. 10); later said it was "something near maybe four-thirty" (R. 22), and finally said it was "kinda beginning to break daylight" (R. 24). The failure of Trent to hear the other two trains which the Reasors heard is explained by reason of his having been awake only a few minutes when he heard the train regarding which he testified (R. 9).

The testimony does not show which one of the two westbound trains that passed between 3:00 A. M. and 5:00 A. M. ran over the bodies of decedents, or which of these trains was propelled by engine No. 1345. The District Court found that the evidence did not show which train struck the decedents, or any causal connection between any fact that was established by the evidence and the death of decedents. The Court further

found that the jury could only surmise as to how the injuries occurred or the time of the occurrence, or that the injuries occurred through "some negligence on the part of some employee of the railroad (respondent) in the operation of the train" (R. 3). Thereupon respondent's motion for a directed verdict in its favor was sustained, and the jury was instructed to return a verdict in favor of respondent (R. 3-5).

The Circuit Court of Appeals, applying the law of Virginia, to wit, that the burden of proof was upon petitioners; that negligence must be proved by affirmative evidence; that negligence cannot be presumed or inferred, and that a verdict cannot be found upon a mere conjecture, found that petitioners failed to carry the burden, and that there was nothing in the evidence that proves in the slightest degree any negligence on the part of the defendant railroad company (respondent). The Court also found that the evidence left the circumstances of the happenings so clouded in uncertainty that it would be impossible for a jury to say with any degree of certainty what did happen, and that the District Court was right in directing a verdict for respondent (R. 58-60). In addition to the cases cited and relied upon by the Circuit Court of Appeals (R. 58, 59), the findings of that Court are fully supported by Southern Ry. v. Hall's Admr., 102 Va. 135, 45 S. E. 867, and Southern Ry. v. Adams, 129 Va. 233, 105 S. E. 566, where the Supreme Court of Appeals of Virginia held that the party who affirms negligence must establish it; by N. & W. Ry. Co. v. Wellon's Admr., 155 Va. 218, 154 S. E. 575, where the same Court held

that in order for a plaintiff to recover it is necessary for him to prove, first, that the defendant was negligent, and, second, that this negligence contributed to the injury, and that there must be some causal connection between the negligence of the defendant and the injuries suffered by the plaintiff; and by Hawkins, *et al.*, v. Beecham, 168 Va. 553, 191 S. E. 640, where the same Court held that negligence and an accident do not make a case; that between them there must be causal connection, and that evidence tending to show causal connection must be sufficient to take the question out of the realm of mere conjecture or speculation and into the realm of legitimate inference, before a question of fact for submission to the jury has been made.

SUMMARY OF ARGUMENT.

I. The Court should not grant a writ of certiorari to review a decision of the Circuit Court of Appeals and re-examine the evidence where the issue turns entirely upon appraisal of the evidence and the reasonable inferences to be drawn from it.

II. The Court should not grant a writ of certiorari to review a decision of the Circuit Court of Appeals, which is rested upon the law of the State where the cause of action arose, and where there is no claim that the decision is in conflict with the decisions of the highest Court of that State, and where there is no question of public importance or of general or federal law involved.

ARGUMENT.

I. The Court Should Not Grant a Writ of Certiorari to Review a Decision of the Circuit Court of Appeals and Re-examine the Evidence Where the Issue Turns Entirely Upon Appraisal of the Evidence and the Reasonable Inferences to be Drawn From It.

The Court is asked to grant a writ of certiorari to review the evidence for the sole purpose of determining whether these cases should have been submitted to a jury for decision or whether the action of the District Court in directing a verdict for respondent was proper (Petition, p. 8). This merely calls for this Court to re-examine and appraise the evidence. Both the District Court and the Circuit Court of Appeals have found that the evidence was not sufficient to submit the question of respondent's negligence to the jury; that the jury could only surmise, first, as to how the injuries occurred, and, second, that the injuries occurred through the negligence of respondent. Under a well-established rule, the Court will accept this concurrent finding and will not re-examine the evidence. *Houston Oil Co. of Texas, et al.* v. *Goodrich, et al.*, 245 U. S. 440; *Spencer Kellogg & Sons, Inc.* v. *Hicks, Admx., et al.*, 285 U. S. 502; *United States* v. *O'Donnell, et al.*, 303 U. S. 501.

Neither will the Court grant a writ of certiorari merely to give petitioners another hearing. *Magnum Import Co., Inc.* v. *Coty*, 262 U. S. 159.

II. The Court Should Not Grant a Writ of Certiorari to Review a Decision of the Circuit Court of Appeals, Which Is Rested Upon the Law of the State Where the Cause of Action Arose, and Where There Is No Claim that the Decision Is in Conflict With the Decisions of the Highest Court of That State, and Where There Is No Question of Public Importance or of General or Federal Law Involved.

The granting of the writ prayed for would only serve to give the defeated parties (petitioners) another hearing in cases decided under the law of Virginia, as applied by the Supreme Court of Appeals of that State. Petitioners do not contend that the decision of the Circuit Court of Appeals is in conflict with applicable local decisions, and there is no question of public importance or of general or federal law involved. There is nothing in the proceedings below that calls for the exercise of this Court's power to review the decisions of the District Court and Circuit Court of Appeals. *Ruhlin, et al.,* v. *New York Life Ins. Co.,* 304 U. S. 202. The lower Courts have correctly applied the law of Virginia where the injuries complained of occurred; therefore, their findings should not be disturbed. *Erie R. Co.* v. *Tompkins,* 304 U. S. 64; *Palmer, et al., Trustees* v. *Hoffman Admr.,* 318 U. S. 109. In the *Palmer* case it is said:

> "Where the lower federal courts are applying local law, we will not set aside their ruling except on a plain showing of error."

No such showing is made in the instant cases. On the contrary, the Virginia cases cited and relied upon in the opinion of the Circuit Court of Appeals and herein show that the applicable law of Virginia, as construed by the highest Court of that State, was applied.

We respectfully submit that the petition for a writ of certiorari should be denied.

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